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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1740~~ 70-198

IN THE MATTER

of

The Settlement of the Final Account of Proceedings of MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under an Indenture of Trust dated December 19, 1935, made by Margaret Maher Acheson for the benefit of Edward Goodrich Acheson, III.

LAURA ACHESON DOWELL, EDWARD GOODRICH ACHESON, IV, MARGARET ACHESON KENNEDY, THOMAS R. ACHESON and JOHN W. ACHESON,

Petitioners,

v.

HELEN F. ACHESON, STEPHEN A. HELMAN, as Guardian ad Litem of LINDA BELLE ACHESON, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Executor of the the Last Will and Testament of Edward Goodrich Acheson, III, Deceased, and MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under an Indenture of Trust dated December 19, 1935, made by Margaret Maher Acheson for the benefit of Edward Goodrich Acheson, III,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1740

IN THE MATTER

of

The Settlement of the Final Account of Proceedings of MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under an Indenture of Trust dated December 19, 1935, made by Margaret Maher Acheson for the benefit of Edward Goodrich Acheson, III.

LAURA ACHESON DOWELL, EDWARD GOODRICH ACHESON, IV, MARGARET ACHESON KENNEDY, THOMAS R. ACHESON and JOHN W. ACHESON,

Petitioners,

v.

HELEN F. ACHESON, STEPHEN A. HELMAN, as Guardian ad Litem of LINDA BELLE ACHESON, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Executor of the the Last Will and Testament of Edward Goodrich Acheson, III, Deceased, and MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under an Indenture of Trust dated December 19, 1935, made by Margaret Maher Acheson for the benefit of Edward Goodrich Acheson, III,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Questions Presented

1. Whether the determination that under California Law an application pursuant to California Code of Civil Procedure § 473 to set aside a judgment on the grounds of mis-

take, inadvertence, surprise or excusable neglect, even if denied, constitutes a submission *in personam* to the jurisdiction of the court thus curing any defect in such judgment arising from lack of jurisdiction of the person of the applicant, deprives the applicant of property without due process of law?

2. Whether under the Constitution of the United States the Trustee of an *inter vivos* trust has an inviolate right to participate in the determination (where such determination may affect the validity of the exercise of a power of appointment of the principal of such trust) of the period subsequent to the termination of such trust during which the principal of such trust shall be held and retained by another fiduciary to whom such principal is or may be distributable upon such termination by reason of such appointment, where the validity of the exercise of the power of appointment based upon such construction and the disposition of the trust principal will be separately determined upon the final account of such Trustee in a New York proceeding to which such Trustee is a party.

Statement

The primary issue before the trial court in this proceeding, a proceeding to which Morgan Guaranty Company of New York was a party, was whether the exercise by Edward Goodrich Acheson, III, a California domiciliary, by will of the power of appointment granted to him under the terms of a New York *inter vivos* trust established for his benefit was in violation of the rule against perpetuities. The *inter vivos* trust was established under a trust indenture dated December 19, 1935, between Margaret Maher Acheson, as settlor, and Guaranty Trust Company of New York (predecessor in interest to Morgan Guaranty Trust Company of New York), as Trustee. Edward Goodrich Acheson, III, died on November 13, 1965, a domiciliary of

Long Beach, County of Los Angeles, State of California. His Will, dated May 18, 1965, was admitted to Probate by the Superior Court of the State of California for the County of Los Angeles.

Under the terms of that will, he exercised the power of appointment granted to him by such trust indenture in favor of Bank of America National Trust & Savings Association, as executor of his estate and trustee of the trusts established under his Last Will and Testament, and directed such Trustee to divide the trust estate into two parts, one of which was for the benefit of his daughter Linda Belle, a person not in being on December 19, 1935, the time of creation of the *inter vivos* trust. It is this part which is the subject of this controversy, and as to which such Will provided that the trust established thereunder was to terminate not later than twenty-one years after the death of the last survivor of testator's wife, Helen (a person in being at the time of creation of the *inter vivos* trust), his daughter, Linda Belle, and the children of said daughter living at the time of his death. Subsequent to the commencement of this proceeding Bank of America National Trust & Savings Association petitioned the Superior Court of the State of California for the County of Los Angeles for instructions as to the construction to be given to the Last Will and Testament of Edward Goodrich Acheson, III. Petitioners did not appear in the construction proceeding before the California Superior Court, and the Order entered in that proceeding construed paragraph VI of said Will as requiring termination of the Trust and distribution of the assets received in trust within twenty-one years from the death of Helen F. Acheson, if not sooner terminated by the death of Linda Belle Acheson.

Subsequent to the entry of such Order, petitioners moved before the California Superior Court for relief from the Order of Instructions to Executor on the grounds that the

Order "was taken against them through their mistake, inadvertence, surprise and excusable neglect." Petitioners' Statement Setting Forth Interests in Estate in support of that motion contained a prayer for relief as follows:

> "1—Executor not inventory and take charge and control of any of the property of the Margaret Maher Acheson Trust and that said assets not be used by the Executor for any purpose;
>
> 2—The provision of paragraph sixth of decedent's will be held to violate the rule against perpetuities and the purported exercise of the power of appointment be invalid; and
>
> 3—For such other and further order as to the Court may seem proper." (A-8).

Petitioners' motion was denied.

It is conceded for purposes of this appeal that Morgan Guaranty Trust Company of New York, as trustee of the New York *inter vivos* trust, was not a party over whom the California Superior Court had personal jurisdiction in the conduct of such construction proceeding.

The New York Court of Appeals, by order entered April 7, 1971, affirmed the order entered by the trial court in this proceeding, which held that the Order of the California Court was binding upon petitioners, petitioners having submitted, *in personam,* to the jurisdiction of such court by moving before such Court to set aside such Order on the grounds of mistake, inadvertence, surprise and excusable neglect, and that such Order was entitled to full faith and credit in the New York proceeding instituted by the Trustee to determine its final account, notwithstanding the absence of such Trustee from the California proceeding. It is this order which petitioners have petitioned this Court to review.

Reasons for Denying the Writ

The order of the New York Court of Appeals has not decided a federal question of substance not heretofore determined by this Court, nor has it decided any such question, except in accord with applicable decisions of this Court, and such order has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

I

The determination that an application pursuant to California Code of Civil Procedure § 473 to set aside a judgment on the grounds of mistake, inadvertence, surprise or excusable neglect, even if denied, constitutes a submission *in personam* to the jurisdiction of the Court thus curing any defect in such judgment arising from lack of jurisdiction of the person of the applicant, does not deprive the applicant of property without due process of law. This proposition has been heretofore established by this Court in its determination in the following cases: *York* v. *Texas,* 137 U. S. 15, 34 L. ed. 604, 11 S. Ct. 9 (1890); *Kauffman* v. *Wooters,* 138 U. S. 285, 34 L. ed. 962, 11 S. Ct. 298 (1891); *Western L. Indemnity Co.* v. *Rupp,* 235 U. S. 261, 59 L. ed. 220, 35 S. Ct. 37 (1914).

A state, without violence to the "due process" clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even (as in the cases of *Young* v. *Texas* and *Kauffman* v. *Wooters*) to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant. *Western L.*

Indemnity Co. v. *Rupp, supra; York* v. *Texas, supra; Kauffman* v. *Wooters, supra.* A nonresident party against whom a personal action is instituted in a state court without service of process upon him may, if he pleases, ignore the proceeding as wholly ineffective, and set up its invalidity if and when any attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565 (1878); *Young* v. *Texas, supra; Western L. Indemnity Co.* v. *Rupp, supra; Sugg* v. *Thornton,* 132 U. S. 524, 33 L. ed. 447, 10 S. Ct. 163 (1889).

But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits. This prevents a party from doing what petitioners attempted to do in the present case in the California proceeding, that is, to secure, if possible, the benefit of a binding adjudication in their favor upon the merits, through the exercise of the court's jurisdiction, while depriving their adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against petitioners. *Western L. Indemnity Co.* v. *Rupp, supra.*

Had petitioners not appeared in the California proceeding, they could properly have asserted that the New York Court was required to ignore the California proceeding as wholly ineffective against them, thus setting up the invalidity of the determination of the California Superior Court in the New York proceeding wherein the disposition of the trust principal upon the final account of the Trustee was to be determined.

Where an opportunity afforded by state practice is lost because a party inadvertently pursues the wrong proce-

dure in the state courts, the fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied. *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 77 L. ed. 231, 53 S. Ct. 98 (1932).

II

Under the constitution of the United States the New York Trustee of an *inter vivos* trust does not have an inviolable right to participate in the determination (even where such determination may affect the validity of the exercise of a power of appointment of the principal of such trust) of the period subsequent to the termination of such trust during which the principal of such trust shall be held and retained by another fiduciary to whom such principal is or may be distributable upon such termination by reason of such appointment, where the validity of the exercise of the power of appointment based upon such construction and the disposition of the trust principal will be separately determined upon the final account of such Trustee in a New York proceeding to which such Trustee is a party. A state may determine, without violating principles of Federal Constitutional Law, that the Trustee of a New York trust is not a necessary party to a California proceeding to construe the Last Will and Testament of a California domiciliary who was the donee of a power of appointment of the principal of such trust where: (a) such domiciliary attempted by such will to exercise the power of appointment of the principal of such trust; (b) the California construction proceeding involved no determination as to the validity of the trust, the validity of the exercise of the power of appointment, or the disposition by the Trustee of the trust principal; and (c) the Trustee was a party to a separate New York proceeding wherein the validity of the exercise of the power of appointment in light of the construction given to such will and the dis-

position by the Trustee of the trust principal upon the final account of such Trustee were to be determined.

In contending that the New York Trustee was a necessary party before the Superior Court of California, petitioners rely upon the case of *Hanson* v. *Denckla,* 357 U. S. 235, 2 L. ed. 2d 1283, 78 S. Ct. 1228 (1958).

The *Hanson* v. *Denckla* case involved the determination by a Florida court of a controversy concerning the right to part of the corpus of a trust established in Delaware, the *res* of which trust was located in Delaware. The Florida Court, without acquiring *in rem* jurisdiction over the trust *res* and without acquiring *in personam* jurisdiction over the trustee declared the trust invalid. The United States Supreme Court in that case upheld the position of the courts of Delaware, that the Florida judgment was not entitled to full faith and credit, because of the failure of the Florida courts to acquire either jurisdiction over the trust *res* or jurisdiction over the person of the non-resident trustee.

The substantive issue before the Florida Court in *Hanson* v. *Denckla* was the validity of the trust itself.

In the case at bar, the Superior Court of California for the County of Los Angeles was not asked to determine the validity of the trust, the validity of the exercise of the power of appointment by Edward Goodrich Acheson, III, or the persons to whom and the manner in which the trust principal was to be distributed upon termination. On the contrary, the California Superior Court was asked to construe the will of Edward Goodrich Acheson, III, so as to impose upon and for the benefit of the Executor of that Will instructions as to the meaning of certain provisions thereof; which instructions would serve to determine the manner in which such Executor would receive, hold and dispose of the assets belonging to the estate of Edward Goodrich Acheson, III, including the proceeds, if any, of

such trust should payment over to such Executor be forthcoming.

The following is a summary of the authorities considered by the Court as the basis for its conclusion in *Hanson* v. *Denckla, supra,* that the Delaware trustee was an indispensable party to the Florida proceeding. (Footnotes 6 and 7 to the Opinion of Chief Justice Warren.)

MacArthur v. *Scott,* 113 U. S. 340, 28 L. ed. 1015, 5 S. Ct. 652 (1885), concerned itself with the validity of a decree annulling the probate of a will in the absence of personal jurisdiction over the executor named in that will. The validity of the instrument appointing such executor being in question, such executor was held to be an indispensable party to the proceeding.

Sadler v. *Industrial Trust Co.,* 327 Mass. 10, 97 N. E. 2d 169 (1951), involved the petition of a life beneficiary for a construction of two *inter vivos* trusts for her benefit. The situs of such trusts was Rhode Island and the trustee was a Rhode Island banking corporation. The Massachusetts court did not have personal jurisdiction over the trustee. Since the case involved the construction of the trust instrument governing the trust to be administered by such trustee, the trustee was found to be an indispensable party to the proceeding.

Trueman Fertilizer Co. v. *Allison,* 81 So. 2d 734 (1955), *Winn* v. *Strickland,* 34 Fla. 610, 16 So. 606 (1894), and *Wilson* v. *Russ,* 17 Fla. 691 (1880), involved actions to determine title to real estate. In each of these cases a trustee over whom the court did not have personal jurisdiction held title to an interest in real estate which was the subject of the controversy between the parties. Accordingly, the court determined in each case that the failure to acquire personal jurisdiction over the trustee prevented the court from rendering a complete judgment.

Florida Land Rock Phosphate Co. v. *Anderson,* 50 Fla. 501, 39 So. 392 (1905) and *Martinez* v. *Balbin,* 76 So. 2d 488 (1954), involved actions to set aside conveyances as fraudulent. In the former of these cases the transferor was held to be an indispensable party to an action to set aside the conveyance made by such party, and in the latter of such cases the transferee was held to be an indispensable party to an action to set aside the conveyance to such transferee.

With respect to each of these cases, it is apparent that the party held to be an indispensable party in the proceeding was directly involved by means of holding legal title to or custody of the property around which the controversy centered and the disposition of such property was the subject of such controversy. In the case at bar, no such issue involving Morgan Guaranty Trust Company of New York was before the California Superior Court, that court having been asked to determine how the Bank of America National Trust & Savings Association, as Executor of the estate of Edward Goodrich Acheson, III, would be instructed as to the proper interpretation of the will governing its administration of the estate. In the event that the principal of the New York trust were to be paid over to such Executor, the principal so paid over would thereafter be administered by the Executor (as would the remainder of the estate of Edward Goodrich Acheson III) in accordance with such instructions. The proceeding before the Superior Court of the State of California did not, however, impose any instructions or duty upon the New York trustee nor seek to interpret the New York trust or to determine the validity of the exercise of the power of appointment granted by the trust indenture governing that trust.

Nor is there any reason to hold that the Trustee of the *inter vivos* trust was a necessary party to the California proceeding or as petitioners contend that the Order of the New York Court of Appeals permits the rule of the *Han-*

son case to be circumvented. The Trustee has no real or significant interest with respect to the trust which was determined in the California proceeding, and as to those matters herein involved with respect to which the Trustee has a real or significant interest each of the same were determined in the New York proceeding instituted by the Trustee. A Trustee has a real or significant interest in matters affecting: (1) the validity or duration of the trust; (2) the trustee's title to the trust *res;* (3) the appointment or removal of the trustee; (4) directions or instructions to the trustee such as instructions concerning the disposition by the trustee of income or principal, the manner of administration of the trust or the powers, authority or duties of the trustee; or (5) the compensation or liability of the trustee. The trustee has no real or significant interest in the determination of the recipient of the income or principal of a trust, provided such determination is made in a manner binding upon all interested parties and provided such determination will afford full protection to the Trustee for his acts in reliance thereon and in accordance therewith. No determination affecting the validity or duration of the trust, the appointment or removal of the Trustee, the Trustee's title to the trust *res,* directions binding upon the Trustee or the compensation or liability of the Trustee was made in the proceeding before the Superior Court of California. On the contrary, questions as to the validity of the exercise of the power of appointment, and the persons to whom and the manner in which the trust principal was to be paid and all other matters embraced in the Trustee's final account were determined by the New York Court in the proceeding instituted by the Trustee. That the construction given by the California Court to the Will of its domiciliary enabled the New York Court to uphold the exercise by such Court of the power of appointment of the principal of such trust is of no concern to the Trustee who was required to distribute the principal of the trust upon the death of Edward Goodrich Acheson, III, either in accordance with the power

of appointment as exercised, or otherwise, and whose sole concern was that it be instructed as to the "persons to whom and the manner in which the corpus of the fund appointed in further trust is distributable" (A-14), and that it be fully protected for its acts in accordance with such instruction.

Conclusion

The Order of the New York Court of Appeals was just and proper and has not decided any federal questions of substance except in accord with applicable decisions of this Court and such Order has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. The petition should, therefore, be denied.

Respectfully submitted,

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APPENDIX

NOTICE OF MOTION FOR RELIEF FROM ORDER OF INSTRUCTIONS TO EXECUTOR ON FIRST AMENDED PETITION AND DETERMINATION OF HEIRSHIP AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. SOP 9309

In the Matter of the Estate
of
EDWARD GOODRICH ACHESON, III,
Deceased.

TO THE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, AS EXECUTOR OF THE WILL OF EDWARD GOODRICH ACHESON, III, DECEASED, AND TO RALPH N. HIGHSMITH ITS ATTORNEY OF RECORD:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, April 1, 1968, at 10:30 A.M. O'Clock, or as soon

thereafter as the matter can be heard, in Department SO-H of the above-entitled Court located at the County Courthouse, 415 West Ocean Boulevard, in the City of Long Beach, County of Los Angeles, State of California, petitioners named above will move the above-entitled Court for relief from the Order of Instructions to Executor on First Amended Petition and Determination of Heirship signed and filed September 18, 1967 and allowing the Statement Setting Forth Interests in Estate of Petitioners to be filed herein.

Said motion will be made on the ground that said Order was taken against the petitioners through their mistake, inadvertence, surprise and excusable neglect.

Said motion will be based upon this Notice, the Memorandum of Points and Authorities in support thereof, the Supporting Affidavits, filed herewith, the copy of the Statement Setting Forth Interests in Estate of Petitioners filed herewith, and upon all of the pleadings, records and files herein.

Dated: March 15, 1968.

ADAMS, DUQUE & HAZELTINE

By GERALD E. PORTER
Attorneys for Petitioners Laura Acheson Dowell, Edward Goodrich Acheson, IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson

MEMORANDUM OF POINTS AND AUTHORITIES

I

Petitioners seek to vacate the order for instructions issued on September 18, 1967, under California Code of Civil Procedure, Section 473, because that Order was taken

against them through their mistake, inadvertence, surprise and excusable neglect, which was in part caused by the acts and conduct of the counsel for the executor herein.

Code of Civil Procedure, Section 473, provides in part:

> "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; . . ."

Hill v. *Johnson,* 194 Cal. App. 2d 779 (1961);
Alderman v. *Jacobs,* 128 Cal. App. 2d 273, 276 (1954);
Miller v. *Lee,* 52 Cal. App. 2d 10 (1942);
Varstanian v. *Croll,* 117 Cal. App. 2d 639 (1953);
Orlando v. *Orlando,* 243 Cal. App. 2d 248, 251-52 (1966).

II

"A party may be relieved from an Order or other proceeding in probate by reason of mistake, inadvertence or excusable neglect."

Estate of Strobeck, 111 Cal. App. 2d 853, 858 (1952).

Section 473 of the Code of Civil Procedure should be construed liberally so as to dispose of cases on their substantial merits.

Beckley v. *Reclamation Board,* 48 Cal. 2d 710, 718 (1957);
Estate of Strobeck, 111 Cal. App. 2d 853, 858 (1952).

III

As set forth in the affidavits filed herewith, two of the five petitioners did not receive effective notice of the hearing on the Petition or Amended Petition for Instructions and for Determination of Heirship. One of the petitioners, Laura Acheson Dowell, received a copy of the notice of the amended petition, but did not receive a copy of that petition. Acting in reliance on attorney Highsmith's letter dated December 14, 1965, she mistakenly thought no affirmative action would be necessary.

IV

Pursuant to decedent's request, on the death of her father, Laura Acheson Dowell contacted by letter Ralph N. Highsmith. In response thereto, Highsmith sent Mrs. Dowell his letter of December 14, 1965, which letter leaves out major details as to the actual disposition of Edward Goodrich Acheson's estate and makes no reference to the Margaret Maher Acheson Trust. It does not clearly state that Mrs. Dowell was expressly disinherited in her father's will, nor does it state that the 5% of Edward Goodrich Acheson, Jr.'s estate, which went directly to the testator upon his father's death, was not to be shared by all of the testator's children.

V

Therefore, the Court should grant petitioners, and each of them, relief from said order, because it was taken against them through their mistake, inadvertence and excusable neglect.

ADAMS, DUQUE & HAZELTINE

By GERALD E. PORTER
Attorneys for Petitioners

STATEMENT SETTING FORTH INTERESTS IN ESTATE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. SOP 9309

In the Matter of the Estate
of
EDWARD GOODRICH ACHESON, III,
Deceased.

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES:

Laura Acheson Dowell, Edward Goodrich Acheson, IV, Margaret Acheson Kennedy, Thomas R. Acheson and John W. Acheson children of decedent, (hereinafter referred to as petitioners) set forth their interests in the above-entitled estate in response to the Amended Petition for Instructions and for Determination of Heirship as follows:

I

In paragraph VIII of the Amended Petition for Instructions and for Determination of Heirship, the Executor herein requested the Court for an order instructing it as follows:

> "(1) That the Executor inventory and take charge and control of all assets of the estate, including both appointive and separate property of the decedent.
>
> (2) That the debts of the estate and all inheritance and estate taxes, attorney fees and costs of administration be paid from the appointive funds to the exclusion of separate funds.
>
> (3) That the appointive assets to the exclusion of separate assets be used to fund Trust 'A'.
>
> (4) That the Executor and testamentary Trustee segregate within both Trust 'A' and Trust 'B' the appointive assets from all other assets.
>
> (5) That an interpretation be given to the provisions set forth in paragraph VI so as not to violate the rule against perpetuities and bring said Trust within the rule of perpetuities, that is, that said provision requires termination of the Trust and distribution of the assets received in Trust from the appointive funds within twenty-one years from the death of HELEN F. ACHESON, the surviving spouse, if not sooner terminated by the death of LINDA BELLE ACHESON."

Executor requested the determination because, as alleged in said Petition, decedent exercised, by will, a power of appointment in a manner which violates the rule against perpetuities, Civil Code, Section 715.2. If said exercise had not violated the provisions of said section, Executor would have rightfully been entitled to take over said assets and act as it requested without order of court.

II

The provisions of decedent's will appointing the property, and in effect disinheriting petitioners, are based on paragraph third thereof which provides as follows:

> "THIRD: At a time of my father's death, EDWARD GOODRICH ACHESON, JR., the portion of his estate which I would have inherited under the laws of succession was divided equally among myself and my following sons and daughters: LAURA ACHESON DOWELL, EDWARD GOODRICH ACHESON, IV, MARGARET ACHESON KENNEDY, THOMAS R. ACHESON and JOHN W. ACHESON. For this reason I make no provision further for these my children who have already shared in my inheritance, and extend to them only my love and affection."

A copy of the will of Edward Goodrich Acheson, Jr. is attached to the Affidavit filed herewith. As set forth in paragraph fourth, decedent herein received outright five per-cent of his father's estate. As set forth in Item 5, 20, the one third of the remainder of the estate set forth in Trust for decedent herein was to be distributed upon his death absolutely in equal shares among his surviving spouse, if any, and his lawful issue then living. The effect of the provisions of Edward Goodrich Acheson, Jr.'s will, therefore, is that petitioners must share with Helen F. Acheson and Linda Belle Acheson in a portion of the assets of the estate of Edward Goodrich Acheson, Jr. and the statement in paragraph third is not true.

IV

The exercise of the power of appointment which is in violation of the rule against perpetuities must be voided unless it can be reformed or construed within the limits of the rule to give effect to the general intent of the testator whenever that general intent can be ascertained. (Civil Code, Section 715.5) In the within situation, the general

intent of the testator is based on an incorrect assumption as to the distribution of his father's estate. By reason thereof, Civil Code, Section 715.5 should not be applied. The provisions of the Margaret Maher Acheson Trust established in 1935 provides that if Edward Goodrich Acheson, III,

> "shall fail effectually so to dispose of the corpus of such part so allocated to him, TRUSTEE shall distribute the corpus of such part to the person to whom, and in the same manner and proportion as, his personal estate would be distributed in case of his intestacy."

The Court should, therefore, find that decedent failed to effectually dispose of his interest in the Trust and said appointive property should not become a part of the assets of the within estate and shall be distributed as provided in said Trust.

WHEREFORE, Petitioners pray for an order as follows:

1. Executor not inventory and take charge and control of any of the property of the Margaret Maher Acheson Trust and that said assets not be used by Executor for any purpose;

2. The provision of paragraph sixth of decedent's will be held to violate the rule against perpetuities and the purported exercise of the power of appointment be invalid; and

3. For such other and further order as to the Court may seem proper.

ADAMS, DUQUE & HAZELTINE

By GERALD E. PORTER

Petition.

(Same Title.)

To the Supreme Court of the County of New York:

The petition of Morgan Guaranty Trust Company of New York, a domestic corporation, having its principal office and place of business at No. 23 Wall Street, Borough of Manhattan, City, County and State of New York, respectfully states, upon information and belief:

1. On December 19, 1935, Margaret Maher Acheson as Settlor entered into a certain Indenture of Trust bearing date said day, with Guaranty Trust Company of New York as Trustee, wherein she assigned, transferred and set over unto said Trustee the securities set forth in said Indenture.

2. Guaranty Trust Company of New York duly accepted the trust set up by said Indenture, received the securities set forth therein and has ever since continued to act as Trustee thereof and to administer said trust in accordance with the provisions of said Indenture.

3. Said Indenture created a trust for the life of Edward Goodrich Acheson, Jr. Upon his death the Trustee was directed to divide the same into six separate equal parts and to continue to hold one of such parts in trust for Settlor's grandson, Edward Goodrich Acheson III, during the term of his life. Upon his death the said trust was distributable in such manner as Edward Goodrich Acheson III shall direct by his Last Will and Testament and in default of a valid appointment to the persons to whom and in the same manner and proportions as his personal estate would be distributed in case of his intestacy.

4. Clause "4" of said Indenture provided that the beneficiary of a trust thereunder may, in his discretion, at any

time remove the Trustee and appoint a successor trustee, which shall be a responsible bank or trust company organized under the laws of the State of New York or of the United States of America or of the state or country wherein the beneficiary may at such time reside.

A copy of said Indenture of Trust is being filed herein.

5. The intermediate account of proceedings covering the acts and transactions of your petitioner as Trustee, in respect of both principal and income from December 21, 1935 to and including January 15, 1942, was judicially settled and allowed by a judgment of this Court dated June 11, 1943.

6. On April 24, 1959, Guaranty Trust Company of New York and J. P. Morgan & Co. Incorporated were merged under the title of Morgan Guaranty Trust Company of New York and hereafter Guaranty Trust Company of New York will be referred to as Morgan Guaranty Trust Company of New York.

7. Edward Goodrich Acheson, Jr. died on January 5, 1962, a resident of St. Petersburg, Florida, leaving a Last Will and Testament dated March 19, 1955 and a Codicil thereto dated March 24, 1955, which were admitted to probate on January 18, 1962, in the County Judge's Court in and for Pinellas County, Florida, and Letters Testamentary were issued to Union Trust Company of St. Petersburg, Florida, the Executor named in said Will which duly qualified.

8. The intermediate account of proceedings covering the acts and transactions of your petitioner as Trustee, in respect of both principal and income from January 15, 1942 through September 7, 1962, was judicially settled and allowed by a final order of this Court dated November 30, 1962.

9. At the date of his death Edward Goodrich Acheson, Jr. was survived by his son, Edward Goodrich Acheson III, and your petitioner received one-sixth of the trust for Edward Goodrich Acheson, Jr. to constitute the trust provided for Edward Goodrich Acheson III.

10. Edward Goodrich Acheson III died on November 13, 1965, a resident of Long Beach, County of Los Angeles, State of California, leaving a Last Will and Testament dated May 18, 1965, which was admitted to probate by the Superior Court of the State of California, held in and for the County of Los Angeles, and which Court appointed Bank of America National Trust & Savings Association the Executor of and Trustee under said Will. Said Bank of America National Trust & Savings Association duly qualified and is still acting as such Executor and Trustee.

At the date of his death Edward Goodrich Acheson III, was survived by his widow, Helen F. Acheson, his sons, Edward Goodrich Acheson IV, Thomas R. Acheson and John W. Acheson, and his daughters, Laura Acheson Dowell, Margaret Acheson Kennedy and Linda Belle Acheson.

11. Edward Goodrich Acheson III by Article "SIXTH" of his Will gave, devised and bequeathed the rest, residue and remainder of his estate, including the remainder of the aforesaid trust, to Bank of America National Trust & Savings Association, to be held in trust for the benefit of his wife, Helen F. Acheson, and his daughter, Linda Belle Acheson, with other provisions as to the distribution of the principal upon the termination of said trusts, as more fully appears from said Will, a copy of which is being filed herewith.

Helen F. Acheson, the widow of said Edward Goodrich Acheson III, is a person who was in being on December 19, 1935, the date of the creation of the trust, herein accounted for, by the said Margaret Maher Acheson, but Linda Belle Acheson was born subsequent to said date.

12. Petitioner is advised that there is or may be a question as to the validity and effect of the Will of Edward Goodrich Acheson III in respect of the appointment to Bank of America National Trust & Savings Association in further trust of the corpus of the trust for his benefit under the Indenture of December 19, 1935 and respectfully requests this Court to construe said Indenture and said Will and instruct and direct it as to the persons to whom and the manner in which the corpus of the fund appointed in further trust is distributable.

13. The names, degree of relationship to the Settlor and the addresses of all persons, other than your petitioner, who have any interest in the subject matter of this proceeding pursuant to the provisions of the Civil Practice Law and Rules and the only persons required to be made parties to this proceeding thereunder are as follows:

Name and Relationship	*Post-Office Address*
Bank of America National Trust & Savings Association as Executor of and Trustee under the Last Will and Testament of Edward Goodrich Acheson III, deceased. (Grandson of the Settlor)	Long Beach District Trust Office P. O. Box 350 Long Beach, California 90801.
Helen F. Acheson (Widow of Edward Goodrich Acheson III, deceased grandson of the Settlor)	1816 Bella Flower Boulevard Long Beach, 4, California
Linda Belle Acheson (Great-Granddaughter)	1816 Bella Flower Boulevard Long Beach, 4, California
Laura Acheson Dowell (Great-Granddaughter)	P. O. Box 404 Douglas, Alaska
Edward Goodrich Acheson IV (Great-Grandson)	1700 North Shore Drive St. Petersburg, Florida
Margaret Acheson Kennedy (Great-Granddaughter)	P. O. Box 6374 Tucson, Arizona

Name and Relationship	*Post-Office Address*
Thomas R. Acheson (Great-Grandson)	c/o Edward Goodrich Acheson IV 1700 North Shore Drive St. Petersburg, Florida
John W. Acheson (Great-Grandson)	c/o Edward Goodrich Acheson IV. 1700 North Shore Drive St. Petersburg, Florida

All of the above named persons are of sound mind and all are of full age, except Linda Belle Acheson who is an infant over the age of fourteen years and who resides with her mother, Helen F. Acheson, who has the care and custody of the said infant at the address above set forth.

Said infant has no general or testamentary guardian appointed in the State of New York.

All of the aforesaid persons are, to the best of your petitioner's knowledge, information and belief, citizens of the United States.

14. All the parties hereto have claims or may claim to have some interest in the principal or income of said trust and comprise all of the persons required to be made parties hereto pursuant to the provisions of the Civil Practice Law and Rules who are or may claim to be entitled absolutely or presumptively to share in the property of the trust and whose rights or interests as such may be affected in any way by the relief prayed for herein.

15. Petitioner has had no judicial settlement of its account of proceedings as Trustee except as aforesaid and petitioner desires that its final account as Trustee, as aforesaid, filed with this petition be judicially settled by this Court.

16. The property which is the subject of this accounting is specific personal property in the hands of petitioner and

is and has been at all times held by petitioner within the City, County and State of New York.

17. Petitioner is informed and believes that the relief prayed for herein can only be granted by a court of equity jurisdiction and that in order to obtain complete relief in the premises the order of this Court is necessary.

18. No previous application has been made to this or any other court for the relief herein sought.

WHEREFORE, petitioner prays that the annexed order to show cause be signed directing the persons listed in paragraph 13 hereof to show cause why an order should not be made by this Court:

(a) judicially settling the final account of proceedings filed herein by Morgan Guaranty Trust Company of New York as Trustee, as aforesaid;

(b) construing said Indenture and the Will of Edward Goodrich Acheson III and instructing and directing Morgan Guaranty Trust Company of New York as Trustee as to the persons to whom and the manner in which the corpus of the fund appointed in further trust is distributable; and

(c) granting such other and further relief as to this Court may seem just and proper, together with such allowances, costs and disbursements as may be properly awarded in this proceeding

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
(Petitioner)

By JOSEPH A. O'CONNOR
Trust Officer

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH A. O'CONNOR, being duly sworn, deposes and says, that he is an officer of MORGAN GUARANTY TRUST COMPANY OF NEW YORK, the petitioner herein, to wit, a Trust Officer thereof; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JOSEPH A. O'CONNOR

Sworn to before me this 9th day of August, 1966.
Margaret M. Bloem
Notary Public, State of N. Y. No. 52-0323300
Qualified in Suffolk County
Cert. filed in N. Y. Co.
Commission Expires March 30, 1967.

(Notarial Seal)